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726-124—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 875

LYNDON A. DURANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–11a) is reported at 324 F. 2d 859. The opinion of the district court (Pet. 13a–23a) is reported at 208 F. Supp. 890.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1963 (Pet. 12a), and a petition for rehearing was denied on December 30, 1963. On January 20, 1964, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to February 28, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for willful tax evasion.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

STATEMENT

Having waived trial by jury, petitioner was found guilty after a trial before the court in the Northern District of Illinois on three counts of having willfully attempted to evade and defeat individual income taxes for the years 1954, 1955, and 1956 by filing false and fraudulent tax returns for those years. The indictment alleged that the net income and taxes reported on petitioner's returns were understated as follows:

Year	Net income		Income tax	
	Reported	Corrected	Reported	Corrected
1954	$273,803	$321,909	$102,963	$166,311
1955	66,855	151,156	20,140	75,689
1956	72,346	165,874	31,800	95,884
Total	413,982	638,939	154,903	337,884

Petitioner was sentenced to concurrent 60-day prison terms and to fines totaling $15,000 (Pet. 3). The court of appeals affirmed the conviction.

The evidence supporting the verdict may be summarized as follows: Petitioner operated the United Manufacturing Co., which was engaged in the production of pin-ball machines and other games, first as a sole proprietorship and, after January 1946, as a corporation. Petitioner was the sole stockholder, president and treasurer of the corporation, and he had full control over its operations (R. 10, 18, 69, 116).[1] Only petitioner and Herbert Oettinger, who was employed as the corporation's vice-president and secretary, were authorized to sign corporate checks (R. 17, 55). Walter B. Taibleson was comptroller and head of the corporation's accounting department (R. 71). Late in 1951 a Treasury agent commenced an investigation of the 1949 and 1950 returns of petitioner and the corporation (R. 115–116). Upon discovering that in many instances petitioner's personal expenses had been charged on the corporate books, the agent cautioned petitioner to stop the practice (R. 129, 160). He also advised petitioner that such payments made by the corporation for petitioner's personal expenses constituted income to petitioner (R. 161). Petitioner replied that such items should have been charged by the corporation to his personal account (R. 129, 160). When the agent brought the matter of these improper charges to Oettinger's attention, Oettinger shrugged his shoulders and replied that petitioner "was the boss" (R. 130).

[1] "R." refers to petitioner's appendix in the court of appeals.

Thereafter, a second revenue agent made an investigation of the individual and corporate returns for the years 1951, 1952, and 1953 (R. 168–171, 334–335, 412). He too discovered that many corporate checks issued in payment of petitioner's personal expenditures had been charged to corporate expense accounts in those years (R. 174–175), and advised petitioner and Oettinger that the corporate deductions were improper (R. 179). Petitioner conceded that these items constituted dividends to him and agreed to the assessment of tax deficiencies (R. 187). In August 1954—before any of the tax returns involved in the present case were filed—petitioner paid $127,963.82 in tax deficiencies on his individual returns for the years 1949 through 1953 and additional tax deficiencies on the corporate returns for the same years (R. 14–15).

Taibleson testified that when he was first employed by the corporation in 1951 Oettinger advised him that it was the usual practice to charge all incoming bills to corporate expense accounts, but that there were occasions when petitioner would instruct Taibleson to charge particular items to his personal account (R. 53, 59). He further testified that petitioner ordinarily brought corporate bills to him, laid them on Taibleson's desk and told him to pay them (R. 56–57). When petitioner wanted a particular item charged to his personal account he would orally instruct Taibleson to this effect (R. 65); unless such oral instruction was given all bills would be charged to corporate expense accounts (R. 48–49, 65–66).

Taibleson also testified that shortly after the investigation made by the second revenue agent, Oet-

tinger told him: "Well, I guess we are not going to be charging [petitioner] for some of these personal bills" (R. 445). This statement was made by Oettinger notwithstanding the agent's specific warning a short time before that if the practice of charging petitioner's personal bills to business expense were continued, the government would "take a more severe position * * *" (R. 446). No one instructed Taibleson to make any changes in the corporation's bookkeeping system, and so far as Taibleson knew petitioner issued no instructions to anyone to change the system (R. 54–55, 60, 64–65, 329).

In 1957 Treasury agents began an investigation of the tax returns of petitioner and the corporation for the years 1954, 1955, and 1956. In examining the corporate books and records the agents discovered many charges to expense for which no underlying documents were available. A team of agents thereupon made between 300 and 350 inquiries of third parties to determine the nature of these expenses (R. 206–210). It was learned that corporate expense accounts had been charged for many gifts of money (ranging from $1,000 to $3,000) made by petitioner to his friends; for personal merchandise purchased in department stores by petitioner's friends; for charges on gasoline credit cards given by petitioner to eleven friends; and for such other personal purchases as clock radios, television sets, hosiery, home furniture (including a piano), a kitchen range, a power mower, electric fans and a hair dryer (R. 9–10, 21–46, 100–109). There were 2,572 such items improperly charged to corporate expense accounts

during the three-year period, and their cost value was $212,328.97 (R. 236–237). The corporate records with respect to most of these items failed to disclose that they were personal in nature, rather than being legitimate business expenses (R. 237).

The district court issued special findings of fact and a supporting opinion (Pet. 13a–23a; R. 456–466). It found, *inter alia,* (1) that in 1954–1956 the corporation had made expenditures for petitioner's "personal economic benefit" in amounts exceeding $51,000, $66,000, and $93,000, respectively; (2) that these expenses were reflected in the corporation's books as business expenses or as acquisitions of depreciable business assets; (3) that these expenses were, in fact, income to petitioner which was not reported on his tax returns; (4) that petitioner had been warned by two revenue agents that it was improper for him to charge personal expenses to corporate accounts; (5) that petitioner did not change the bookkeeping and accounting systems after these warnings; (6) that petitioner submitted bills to Taibleson and gave purchase instructions to the corporation's purchasing agent without telling them to charge specific personal items to his personal account; (7) that petitioner "knew at the time he filed his income tax returns for each of the years 1954 to 1956, respectively, that he had taxable income as a result of the payments made by United for his personal economic benefit * * *"; and (8) that such income tax returns "were false when filed * * * and [petitioner] knew them to be false at the time of their filing." In the supporting opinion, the court observed that the substantial number and

volume of the expenses incurred by the corporation for petitioner's personal benefit "compel the conclusion that [petitioner] was aware of them and the manner in which they were being handled on the corporation's books." Having been warned by the agents that such expenses were income to him, and having been previously charged for similar expenses made during earlier tax years, petitioner was held by the district court to have had knowledge that such items should have been included on his personal tax returns. Accordingly, the court concluded that "[t]he only reasonable inference from defendant's conduct is that he deliberately and willfully continued practices which he had been advised were improper and the effect of which was substantially to understate his taxable personal income."

ARGUMENT

The only issue in this case is whether the evidence was sufficient to sustain the district court's conclusion that petitioner's attempts to evade personal income tax were done "willfully." The decision does not, as petitioner contends, sweepingly subject corporate executives to criminal liability for minor imperfections in the bookkeeping services performed by their employees. Rather, it permits a district court to infer that evasion of tax was deliberate and willful from evidence demonstrating a consistent and aggravated course of conduct which has been continued in the face of warnings by government agents. The decision was correct and does not, therefore, call for further consideration by this Court.

1. Petitioner's contention that the court of appeals' decision is irreconcilable with *Spies* v. *United States*, 317 U.S. 492, is totally without merit. In *Spies* the failure to file any return whatever was held to be covered by the misdemeanor provision which is presently Section 7203. *Spies* certainly did not hold, nor did it even suggest, that the actual filing of a false or fraudulent return, if done with the requisite intent, would not be punishable as a felony under the present Section 7201. Indeed, it is well-established that such false filing is precisely the kind of "affirmative" conduct which Section 7201 was meant to prohibit. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *Smith* v. *United States*, 348 U.S. 147, 159; *Cave* v. *United States*, 159 F. 2d 464, 466 (C.A. 8th); *United States* v. *Rosenblum*, 176 F. 2d 321, 329–330 (C.A. 7th); *United States* v. *Croessant*, 178 F. 2d 96 (C.A. 3d), certiorari denied, 339 U.S. 927. In *Rick* v. *United States*, 161 F. 2d 897, 898 (C.A. D.C.), it was noted that the filing of a false return is "the most common and also the most flagrant method of willfully attempting to defeat or evade an income tax." Consequently, the "affirmative" conduct required by *Spies* was fully satisfied here by petitioner's filing of the false returns.

2. There is no conflict between this decision and those in other circuits, as petitioner alleges (Pet. 17–18). The district court and the court of appeals recognized here, as did the courts in the cases cited

by petitioner, that willfulness requires more than a showing of carelessness, negligence, or inadvertence.[2] Applying the proper standard (Pet. 22a; R. 465), the district court correctly determined that petitioner, who was the sole stockholder of the corporation and had complete control over its operations and its employees, had acted willfully by intentionally continuing a practice which had been condemned by revenue agents and which petitioner had personally acknowledged as wrongful by voluntarily paying the tax deficiencies assessed upon him and the corporation for earlier years.

3. The evidence in this case presents a picture which is markedly different from the hypothetical instances of "improper and negligent bookkeeping practices" suggested as analogies by petitioner (Pet. 10–11). Petitioner here had knowledge of the misuse of the corporate books and had been warned by government agents of the consequences of permitting it

[2] In *Pappas* v. *United States*, 216 F. 2d 515 (C.A. 10), and in *Gaunt* v. *United States*, 184 F. 2d 284 (C.A. 1), the courts of appeals sustained instructions by trial courts which defined "willfully" in these terms. In *United States* v. *Pechenik*, 236 F. 2d 844 (C.A. 3), the proof failed to support an inference that the defendant was aware of the corporation's improper accounting practices, and in *United States* v. *Allen*, 44 A.F.T.R. 894, 896 (S.D. Cal.), it was found that a disgruntled employee had falsified the books without the defendant's knowledge. None of these cases supports petitioner's contention that knowledge of the sort shown here, together with continued disregard of the law, is insufficient to sustain the inference of willfulness.

to continue. Moreover, throughout the relevant years petitioner was receiving daily and weekly reports which showed, *inter alia*, the amount of corporate checks "released" each day and the charges to petitioner's personal account on the corporation's books (R. 66–67, 84, 87, 405–406). Notwithstanding the warnings and knowledge he had, petitioner made no change in the bookkeeping system. Instead he amassed, over the course of three years, more than $212,000 in total personal expenses which were paid by the corporation and which appeared on its books as ordinary business expenses. This deliberate course of conduct was patently a far cry from mere "incomplete and imperfect" bookkeeping practices. It fully justified the district court's conclusion that petitioner had acted deliberately and willfully.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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